CHAPTER 2

REGULATORY CRIME

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2.1 Introduction

In examining the contours of criminal law and its application, most lawyers and criminologists are drawn to traditional 'real crime' (homicides, violent assaults, organised crime, sexual offences, requirements of *mens rea* and *actus reus*, and general defences) whilst ignoring white collar offences which are often enforced by specialist agencies. As a society we have tended to be preoccupied with the 'punitive regulation of the poor', a project closely tied to a police-prisons way of knowing that focuses on 'crime in the streets' rather than 'crime in the suites' (see J Braithwaite (2003) and 'What's Wrong with the Sociology of Punishment' 7(1) Theo. Crim. 5-28 at 7). The narrow exclusivity of this approach is a mistake, not least because criminalisation is now more than ever viewed as a panacea for almost any social problem. More and more Irish society is witnessing the increasing and extensive use of regulatory strategies by the Irish state. In areas such as competition law, environmental protection, health and safety law, and consumer and corporate affairs, there has been a move towards using criminalisation as the last-resort strategy when compliance through negotiation and monitoring has failed.

Distinctions have traditionally been drawn between regulatory crimes and ordinary crimes on the basis that the former are *mala prohibita* (prohibited wrongs) and the latter are *mala in se* (moral wrongs). Regulatory crimes, it was suggested, should be thought of in 'instrumental means-ends terms', as not embodying quasi-moral values

such as ‘justice, fairness, right, and wrong’ (see N Lacey ‘Criminalisation as Regulation: the role of the criminal law’ in C Parker et al, eds, *Regulating Law* Oxford: OUP, 2004, p. 145). Regulatory crimes were viewed as ‘quasi administrative matters’ that did not attract significant moral opprobrium or stigmatise those convicted (see F McAuley and P McCutcheon, *Criminal Liability*, Dublin: Round Hall, 2000, p. 341). It has also been argued that regulatory crimes are more likely to be victimless (or at least not have a readily identifiable victim). Furthermore, and as noted above, it is suggested that regulatory offences for the most part do not embody a punitive or sanctioning model of justice, preferring instead to favour compliance strategies.

2.2 The definition and causes of white collar crime

Edwin Sutherland is reported to be the pioneer of white collar criminology. He suggested that white collar crime was ‘a crime committed by a person of respectability and high social status in the course of his occupation’ (see *White Collar Crime* New York: Dryden Press, 1949, p. 9), thus challenging the stereotypical assumptions about all crime being committed by the lower classes. He went on to note that the ‘…financial cost of white collar crime is probably several times as great as the financial cost of all the crimes which are customarily regarded as the ‘crime problem…’ (‘White Collar Criminality’ 1940 5(1) Am. Sociol. Rev. 1-12 at 5). More significantly, Sutherland also emphasised the impact of such crime on society: ‘The financial loss from white collar crime, great as it is, is less important than the damage to social relations. White-collar crimes violate trust and therefore create distrust, which lowers social morale and produces social disorganisation on a large scale. Other crimes produce relatively little effect on social institutions or social organisation.’ (*ibid*, at 5).

A key point for Sutherland was to emphasise the idea that white collar criminality was real criminality. It may not feature in debates about the crime problem or on the law and order agenda, but this was a mere labelling matter: '…white collar criminality differs from lower class criminality principally in an implementation of the criminal law which segregates white-collar criminals administratively from other criminals…' (*ibid*, at 11-12). The fact that it is not ordinarily called crime is facilitated by a degree of remoteness as it is far removed from one's immediate experience. If an individual overpays for goods because of price fixing, or is overcharged by banks, there is not a perception that he or she is marked out specifically as a crime victim. If however the same individual was robbed on the street of this money, the perception of what occurred, and the label that would attach, would be different.

Defining white collar crime is problematic. As Sutherland suggested, it is 'a crime committed by a person of respectability and high social status in the course of his occupation'. There are a number of elements to this definition.

a) It is 'a crime': This is an obvious element but it is often forgotten.

b) It is 'committed by persons of respectability' i.e. someone with no convictions for non-white collar crime. But should this category not also include corporations where they engage in criminal wrongdoing? For example, the Law Reform Commission recommended in 2005 that a corporation should be liable for manslaughter if the prosecution proves that it was grossly negligent in a way which caused death (see LRC, *Report on Corporate Killing* (LRC 77-2005)).

c) It is committed by 'individuals of high social status'. This is a problematic statement e.g. environmental offences are not always committed by persons of high social status.

d) It is committed in the 'course of his/her occupation'. This categorisation relates to offences such as price fixing, overcharging, false accounting, charging for unnecessary work, pilfering, bribery, money laundering, misuse of computers, telephone, photocopier, time fiddling, insider trading, amongst other such wrongs. Sutherland's definition is not all-encompassing as it does not include similar wrongs not made in the course of employment e.g. tax evasion or false claims made against insurance companies.

Suggested additional elements to the definition of white collar crime to join Sutherland's four elements might be 'a violation of trust' (*see* K. Williams, *Criminology* Oxford: OUP, 2001, 64) and the 'organisational' or 'economic' attributes of white collar crime.

It is clear, therefore, that considerable disagreement exists about the range of misconduct that would fall within the definition. In order to avoid the straight-jacket of overly prescriptive accounts, some commentators have accordingly attempted to develop typologies of the forms of crime that may fit under the general penumbra of white collar crime. These include: financial offences (from share dealing to bribery to tax evasion); offences against consumers (price fixing, illegal sales, unfit goods);crimes against employees; and crimes against the environment. (See S. Tombs, 'Corporate Crime' in C Hale et al, eds *Criminology*, Oxford: OUP 267-287 at 269).

If there are tensions in relation to the definition of white collar crime, it is also the case that there is no settled agreement on causation. Whilst there is consensus that theories of crime that focus on poverty or poor socialisation cannot account for the phenomenon of white collar crime, no criminological approach has emerged to dominate the landscape. Instead, a variety of approaches can be employed, the merits

of which may vary depending on ideological standpoint or the circumstances of individual cases. To begin with, one can refer to 'classicism or rational choice theory'. This approach presupposes that crime is based on calculative reasoning, in which the actor coldly weighs up the perceived benefits and ranges them against the expected costs (likelihood and consequences of detection). As Charles Murray, for example, notes: '…offenders are extremely pragmatic. Their calculations seemed to be based on a hard headed appreciation of the facts' (see 'The Physical Environment and Community Control of Crime' in J Wilson, ed, *Crime and Public Policy* San Francisco: ICS Press, 1983, p. 115). Similarly Richard Posner would suggest that:

> '…a criminal is someone who has chosen to engage in criminal activity because the expected utility of such activity to him, net of expected costs, is greater than that of any legitimate alternative activity. His calculation of advantages can be altered by changing any of a number of factors and the severity of the punishment, in the event punishment is imposed, in turn affects the expected cost of punishment' (*Economic Analysis of Law* Boston, Little, Brown and Company, 1972, p. 365).

Weak regulation or non-enforcement therefore provides a fertile ground for white collar criminality.

Some criminologists would suggest that white collar crime can be explained by 'differential association' i.e. criminal behaviour is learnt behaviour. If an individual is in an environment where there is a surplus of favourable dispositions to law violation over unfavourable dispositions, this may contribute to his or her involvement in crime. This learning, and exposure to different definitions regarding the appropriateness or otherwise of certain behaviours, emerges out of our various associations. These associations vary by frequency, duration (a lot of time spent in the

workforce), priority (loyalty to the firm), and intensity ('everyone in the trade is doing it'). As Edwin Sutherland notes: 'white collar criminality, just as other systematic criminality, is learned; that it is learned in direct or indirect association with those who already practice the behaviour; and that those who learn this criminal behaviour are segregated from frequent and intimate contacts with law-abiding behaviour. Whether a person becomes a criminal or not is determined largely by the comparative frequency and intimacy of his contacts with the two types of behaviour. This may be called the process of differential association' (see 'White Collar Criminality' 5(1) Am. Sociol. Rev. 1-12 at 10-11). Two criminologists, Gresham Sykes and David Matza, argue that criminals also learn 'techniques' that enable them to 'weaken' the hold society places over them, and to justify their wrongdoing. These techniques act as defence mechanisms that discharge the wrongdoer from the constraints associated with moral order. This is particularly true of white collar offenders who are likely to perceive themselves as conventional law-abiding citizens and not typecast criminals. There are five such techniques: denial of responsibility e.g. I was following corporate orders; denial of injury e.g. I did not cause any harm; denial of the victim e.g. there is no real victim; condemnation of the condemners e.g. they are all at it; appeal to higher loyalties e.g. the company depends on me, what was I going to do? (see ('Techniques of Neutralisation: a theory of delinquency' Am. Sociol. Rev. 22 (1957) 664-670).

Some also support the view that white collar crime is caused by 'strain'. Structurally induced strain in society is created through an emphasis on economic success, the pursuit of individual self-interest, competitiveness, and materialism. In the world of business, the pressure to win market share, exceed targets and increase profits are compelling inducements. White collar crime can thus be seen as an innovative response on the part of businesses when individuals and institutions are unable to

achieve their goals through legitimate channels. In these circumstances, and aware of the disjunction between institutionalised aspirations (pressures to maximise profit, growth, efficiency) and the availability of legitimate opportunities, white collar criminals will 'innovate' in order to achieve institutional goals. As Robert Merton notes, '…on the top economic levels, the pressure towards innovation not infrequently erases the distinction between businesslike strivings this side of the mores and sharp practices beyond the mores…' (see 'Social Structure and Anomie' 3 Am. Sociol. Rev.1938, 672-682 at 677). If the institution, or society, values and rewards the goal of achievement over the means by which it is attained, criminal acts may well be forgiven, understood as 'being part of the business'.

Finally, those who support 'labelling or Marxist' perspectives would draw attention to the fact that it is a mistake to see deviance simply as the infraction of some agreed rule (positivism). To do so is to ignore the fact that what constitutes crime is to some extent a product of the capacity of powerful groups to impose their definitions of crime on the behaviour of other groups. In other words, crime is not a pre-given, objective concept; rather it has an open texture, a negotiable and fluid status that allows it to be shaped to particular ends. As Howard Becker noted: '…[s]ocial groups create deviance by making the rules whose infraction constitutes deviance, and by applying those rules to a particular people and labelling them as outsiders…' (see *The Outsiders*, New York, Free Press, 1963, 9). In Ireland, Ciaran McCullagh has suggested:

The law making process is the means through which the criminal label is distributed in society. As it operates in Ireland, the process of law making distributes this level in an uneven manner. It sanctions some kinds of socially harmful behaviour and ignores others. It is aided and abetted by an enforcement system that devotes more resources

to the pursuit of some kinds of law-breaking than others… The end product of this system, is a criminal population which contains a disproportionate number of those who are poor, uneducated and unskilled.

(See 'Getting the Criminals We Want: the social production of the criminal population' in P Clancy, ed, *Irish Society: sociological perspectives,* Dublin: IPA, 1995 pp. 411-412).

2.3 The failure to treat white collar crime seriously

It has long been felt that the rich and powerful are relatively immunised from the full reach of criminal law. W.G Carson, for example, in examining white collar crime in factories in England in 1970 noted: '…The behaviour of persons of respectability and upper socio-economic class frequently exhibits all the essential attributes of crime but it is only very rarely dealt with as such. Systems of criminal justice favour certain economically and politically powerful groups and disfavour others, notably the poor and unskilled who comprise the bulk of the visible criminal population' (see 'White Collar Crime and the Enforcement of Factory Legislation' 10(4) B.J.Crim. 1970, 383-390 at 384). Similarly, the French philosopher Michel Foucault suggested:

> …it would be hypocritical or naïve to believe that the law was made for all in the name of all; that it would be more prudent to recognise that it was made for the few and that it was brought to bear upon others; that in principle it applies to all citizens, but that it is addressed principally to the most numerous and least enlightened classes; that in the courts society as a whole does not judge one of its members, but that a social category with an interest in order judges another that is dedicated to disorder: "Visit the places where people are judged, imprisoned or executed…One thing will strike you everywhere;

everywhere you see two quite distinct classes of men, one of which always meets on the seats of accusers and judges, the other on the benches of the accused"…Law and justice do not hesitate to proclaim their necessary class dissymmetry. (*See* M Foucault, *Discipline and Punish: the birth of the prison* Harmondsworth, Penguin, 1991, p. 276)

For Foucault, then, criminality and penality were '…ways of handling illegalities, of laying down the limits of tolerance, of giving free rein to some, of putting pressure on others, of excluding a particular section' (*ibid*, at 272). This made it possible to 'leave in the shade' certain crimes that do not follow the 'police-prosecutions-prisons' trajectory. The following vignettes are an indicator of the extent to which dissymmetry exists in Ireland in relation to perceptions of criminal wrongdoing:

- A Mayo farmer who pleaded guilty to seven counts of making incorrect tax returns between 1991 and 1998 and who failed to declare an investment of almost €20,000 in an offshore account received a suspended prison sentence. The offender owned land worth more than €3 million, despite having declared an annual income of just £400 over a ten year period in the 1980s and 1990s. He held a number of bogus non-resident accounts and accounts in the names of deceased persons. The week before his case came to court he paid €316,000 to the Revenue Commissioners. According to a newspaper report about the case, the criminal was described by his parish priest as a 'good, decent, honest to goodness' person who worked hard. The priest added that he had never seen the offender's wife without Wellingtons on her when he called to the house. (See S Kilcommins et al, *Crime, Punishment and the Search for Order in Ireland* (Dublin, IPA, 2004), 132-133).

- ‘Those who are tempted to make serious breaches of company law have little reason to fear detection and prosecution. As far as enforcement is concerned, the sound of the enforcer’s footsteps on the beat is simply never heard’. (See ‘Working Group on Company Law Compliance and Enforcement’ 1998, para 2.5).
- The costs of crime investigated by the Revenue Commissioners far exceed the costs of street crime. The Whitaker Committee estimated that the losses incurred through white-collar crime in 1984 were more than ten times the value of all stolen property recorded by the Gardaí… The total value of property stolen in burglaries, larcenies and robberies in 2002 was €97 million. In the same year, seven times as much money was collected as a result of investigations into just three waves of illegal activity involving some of Ireland’s most influential citizen… the DIRT and bogus non-resident account investigation (over €600 million); unauthorised offshore investments sold by National Irish Bank (€43 million); and the Ansbacher deposits (€21 million) (S Kilcommins et al, *Crime, Punishment and the Search for Order in Ireland* Dublin, IPA, 2004, at p. 131).
- In a report on corruption in Ireland from 2006 to 2009, [Transparency International] concluded that there is very little of what it calls ‘petty’ corruption such as the bribing of officials…What it did find however is that ‘Ireland is regarded by domestic and international observers as suffering high levels of legal corruption’. It defines this as situations where political policy and political decisions are ‘believed’ to be influenced by personal connections, patronage, political favours and donations to politicians and political parties. It sees the risks of corruption as high in relation to appointments to public

bodies, a power in the control of individual ministers, in relation to the funding of political parties where 'influence selling has yet to be outlawed', where political lobbying is unregulated, where political parties do not have to publish accounts and where the public contracting system is open to 'significant abuse'. (See C McCullagh, 'Two Tier Society; Two Tier Crime; Two Tier Justice' in Kilcommins and Kilkelly, eds, *Regulatory Crime in Ireland*, 2010, 150).

2.4 Should criminalisation and imprisonment be employed at all in relation to white collar crime?

Some commentators in looking at white collar crime argue that, where possible, we should not use the full force of the criminal law, the implication being that a sanctioning approach to wrongdoing is inefficient and likely to dampen the entrepreneurial spirit. Instead compliance strategies should be employed to govern white collar wrongdoing. These compliance techniques involve persuasion and dialogue, facilitate good working relationships, thereby producing more efficient outcomes. For example, the Director of Public Prosecutions, James Hamilton, argues for the increased use of administrative sanctions. The advantage of employing such measures would be that the criminal law would not be cluttered up with provisions which did not 'always carry the same moral stigma as convictions for the core criminal offences' (J Hamilton, 'Do we need a system of administrative sanctions in Ireland' in Kilcommins and Kilkelly, eds, *Regulatory Crime in Ireland* (Dublin, First Law 2010, 15-2, at 17). Moreover, the current level of criminal penalties, particularly fines, do not adequately reflect the benefit to the wrongdoer, and therefore do not adequately deter. Finally, he suggests that running complex regulatory issues before

lay juries is a difficult exercise (*ibid* at 21). One is reminded that the use of administrative penalties in Ireland does give rise to constitutional difficulties particularly having regard to Article 34 which deals with the exclusive authority of the courts in the administration of justice and Article 37 which prescribes the restriction of the determination of criminal matters to the courts. Professor Irene Lynch Fannon makes a similar point (see I Lynch Fannon, 'Controlling Risk Taking: whose job is it anyway?' in Kilcommins and Kilkelly, eds, *Regulatory Crime in Ireland*, Dublin: First Law, 2010, 113-127). She suggests that burden of proof in criminal cases makes it difficult to obtain prosecutions. Secondly, if criminal prosecutions are pursued, it will inevitably mean more litigation given that the individuals involved 'will have the resources to test every legal argument' (*ibid*, at 115). There would also be an increased number of constitutional challenges. Finally, she notes 'that there does not seem to be any great enthusiasm for incarceration as a means of dealing with white collar criminals' (*ibid*, at 116). She goes on to suggest that 'the possibility of imposing a more effective civil sanction which meets and regulates the behaviour at stake, instead of worrying about a less than effective criminal sanction following an expensive criminal trial is compelling' (*ibid*, at 127). This echoes the sentiments of the Macrory report (R Macrory, *Regulatory Justice, Making Sanctions Effective* (Cameron, May, 2008) in the UK in 2008 where it was stated: '…[c]riminal prosecution may not be, in all circumstances, the most appropriate sanction to ensure that non-compliance is addressed, any damage is remedied or behaviour is changed. The availability of other more flexible and risk based tools may result in achieving better regulatory outcomes.'

Similarly, Professor Sandeep Gopalan, in a consultation session held in November 2010 on white collar crime as part of the Department of Justice and Law Reform's

White Paper on Crime, warned against the over criminalisation of conduct which was traditionally dealt with by other areas of the law. He described the effects of the criminalisation of white collar crime in the following terms:

> '…it undermines the coercive power of the criminal law, dilutes its expressive power, over-deters otherwise desirable business activities, conflates blameworthiness with imprisonment, creates incentives for prosecutors to abuse their powers, fuels an appetite for enhancing prison terms, increases social costs and punishes people for actions that in some instances are not even civil wrongs, let alone undertaken with the taint of moral wrongfulness.'

He also alluded to the disproportionate burden of conviction on white-collar offenders. In particular he suggested that that if the cost of imprisonment is the same for offenders with different earning capacities, imprisoning those with very high earning capacities is a waste of social capital, especially if the objectives of incarceration can be achieved through other means.

There is merit in these arguments. The line between poor business decision-making and criminal activity is far from clear cut. Moreover, white collar crime is hard to detect because it often occurs in private, behind closed corporate doors. It is also the case that proof is difficult in these cases, and often resource intensive. As was noted in the White Paper on Crime, Criminal Sanctions Discussion document, '…white collar offenders are more likely to have assets and to be in a position to pay fines, and to provide substantial economic restitution to their victims. From society's perspective, this may be preferable to imposing a prison sentence'.

Others like Shane Kilcommins and Barry Vaughan would suggest that whilst compliance and civil strategies should be accommodated where possible, one must also be committed to supporting criminal sanctioning strategies that send out the

message to white collar criminals that their wrongdoing is treated seriously by society and will, if the circumstances warrant it, result in imprisonment like it does for street crimes (see S Kilcommins and B Vaughan, 'The Rise of the Regulatory Irish State' in Kilcommins and Kilkelly, eds, *Regulatory Crime in Ireland,* 2010, 90-91). To close off the possibility of imprisonment for white collar crime is a mistake for a number of reasons. To begin with our ordinary criminal justice system is founded on the notion that public protection and security are 'essential goods' that are necessary for our self-preservation, well-being, and happiness. This is hardly contentious. Most people would agree that we need a system of justice that will enable us to flourish and go about our lives free from the threat of injury or harm e.g. robberies, rapes, assaults, burglaries, etc. What is striking, however, is that the perception stills exists in Ireland that white collar crime does not threaten our security in the same way that street crime does. This is a fallacy. Though it may appear more remote, more victimless and may often be less dramatic, misconduct in the banking and corporate sectors, in the workplace, in the environment, in the political arena and in the distortion of competition in the market poses as much, if not more, of a threat to our everyday lives as ordinary crime, with the potential to affect more people. Our security can be affected in a myriad of different ways by misconduct of this nature including, among other things, workplace injuries, loss of equal opportunity, loss of competition, loss of jobs, loss of reputation and the consequent devaluation of share prices and pension funds, threats to the environment, increased taxation, and increased costs for consumers. To-date, our society has adopted a very narrow understanding of what constitutes a threat to our security, fastened to a very traditional outlook that views white collar wrongdoing as having rather benign effects. The development of a more nuanced understanding that jettisons such traditional thinking is of paramount

importance. Jurgen Habermas, in a book entitled *Between Facts and Norms* (Cambridge, Polity Press, 2008 repr), noted that our legal system needs to move away from 'personal references and towards system relations'. These include: 'protection from environmental destruction, protection from radiation poisoning or lethal genetic damage; and, in general, protection from the uncontrolled side effects of large technological operations, pharmaceutical products, scientific experimentation, and so forth (*ibid* 432-435)'.

Once the seriousness of white collar wrongdoing is recognised, then one must also recognise that compliance strategies alone cannot best guarantee security for society. A compliance model of justice (negotiation, persuasion, etc.) speaks primarily to the 'good man' who seeks to act in good faith and employs the law as a normative guide to conduct and action, and not to the 'bad man' who seeks to evade the strictures of the law. In Ireland, and as regards white collar wrongdoing, we seem to have operated for the most part along the dimension of persuading, never punishing (even though the necessary criminal sanctioning tools are in place). In order to encapsulate both forms of conduct, the compliance model must also be supported by a sanctioning model that includes the use of imprisonment. To suggest otherwise would be to endorse a two-tier system of justice, something which would make a mockery of the notion of equality for all citizens before the law. If we accept the potential deterrent possibilities of imprisoning offenders for ordinary, often less serious, street crimes, then as a matter of principle we have to be prepared to accept that prison can also act as a similar deterrent for very serious white collar wrongdoing. Though our criminal justice system, in its ideology and generality, is geared towards the notion of being class neutral, the reality is somewhat different. Finally, we should not underestimate the powerful cathartic effects that the proper use of criminal law can provide in

society. Many Irish citizens have grown weary of 'wink and nod' politics, 'golden circles', 'golden handshakes', massive spends on tribunals with little or no real consequences, and the degree to which the rich and powerful appear to be immunised from the full reach of the law. In these circumstances the criminal law and the punishments that follow it can act as a platform for the expression of collective outrage. The criminal law is designed to uphold moral sensibilities and it permits a powerful message to be conveyed in relation to the anger felt by ordinary citizens about the commission of certain crimes. It also acts as an important safety valve, limiting the 'demoralising effects' on society of the consequences of serious misconduct. Of course, in saying this, one should be careful not to employ the criminal law to scapegoat individuals, to facilitate intolerance and repression, or to punish excessively. The courts, however, have developed a comprehensive jurisprudence, largely in the street crime field, for ensuring fairness of procedures and proportionately of punishments which should allay any concerns we have in this regard.

2.5 Regulatory crime in Ireland

There are a number of interesting characteristics about the current use of these regulatory strategies in Ireland. Since the 1990s, we have increasingly witnessed the extensive use of regulatory strategies in areas such as competition law, environmental protection, health and safety law, and consumer and corporate affairs (see Colin Scott, 'Regulatory Crime: History, Functions, Problems, Solutions' in Kilcommins and Kilkelly, eds, *Regulatory Crime in Ireland,* 2010, 63-86 at 69). An official report produced by the Better Regulation Unit in 2007 found that there were 213 bodies with statutory regulatory powers. These strategies are supported by a wide range of criminal sanctions available summarily and on indictment.

2.5.1 INCREASED GOVERNANCE

First, the emergence of this regulatory criminal framework is significantly different from the unified monopolies of centralised control underpinning policing and prosecution in the modern State. Arguably these new techniques and strategies can be seen as part of a pattern of more, rather than less, governance, but taking 'decentred', 'at-a-distance' forms. Prior to the nineteenth century, the institution of local policing was heavily orientated towards the 'creation of an orderly environment, especially for trade and commerce' (see J. Braithwaite, *Neoliberalism or Regulatory Capitalism* Canberra, Regulatory Institutions Network, 2005, 13-14). It did not focus exclusively on offences against persons and property, but also included the regulation of 'customs, trade, highways, foodstuffs, health, labour standards, fire, forests and hunting, street life, migration and immigration communities' (see J. Braithwaite, 'The New Regulatory State and the Transformation of Criminology' 40 Brit. J. Criminol. 2000: 222-238 at 225). Throughout the nineteenth century, however, the State very gradually began to monopolise and separate the prosecutorial and policing functions, particularly for serious crimes. In terms of policing, this meant that uniformed paramilitary police were preoccupied with the punitive regulation of the poor to the almost total exclusion of any interest in the constitution of markets and the just regulation of commerce, became one of the most universal of globalised regulatory models.

From the mid-19th century, factories inspectorates, mines inspectorates, liquor licensing boards, weights and measures inspectorates, health and sanitation, food inspectorates and countless others were created to begin to fill the vacuum left by constables now concentrating only on crime. Business regulation became variegated into many specialist regulatory branches (Braithwaite 2005: 15-16). In Ireland, these

specialist agencies included the Bacon Marketing Board, the Irish Tourist Board, the Racing Board, the Health Authorities, CIE, Bord na gCon, and the Opticians Board.

Similarly during the course of the nineteenth century conflicts were no longer viewed as the property of the parties most directly affected. Previously strong stakeholder interests in the prosecution process, such as victims and the local community, were gradually colonised in the course of the nineteenth century by a State apparatus which acted for rather than with the public.

Now, however, the Office of the Director of Public Prosecutions is, to some extent, increasingly losing its monopoly role. The number of administrative agencies that have entered the criminal justice arena, colonising the power to investigate regulatory crimes in specific areas and to prosecute summarily, has increased dramatically in Ireland in recent years. They include: the Revenue Commissioners, the Competition Authority, the Director of Consumer Affairs, the Environmental Protection Agency, the Health and Safety Authority, and the Office of the Director of Corporate Enforcement.

Significantly, these agencies have both investigative and prosecution functions, with each pursuing their own agendas, policies and practices e.g. in 2009, the Competition Authority investigated price fixing of Citroen cars by members of the Citroen Dealers Association. Suspended custodial sentences were imposed by the courts ranging from six to nine months, in addition to fines ranging from €2,000 to €80,000. The National Employment Rights Authority can also initiate summary criminal prosecutions where a breach of employment rights legislation has been identified. In 2013, NERA initiated 84 prosecutions, an increase of 20% from 2013.

The Office of Environmental Enforcement within the Environmental Protection Agency (EPA) is dedicated to the implementation and enforcement of environmental

legislation in Ireland. For example, on 19 February 2014 the EPA prosecuted Oxigen Environmental at Dundalk District Court. The Company pleaded guilty to a variety of offences including "[f]ailing to ensure that the activities were carried out in a manner such that emissions did not result in significant impairment of or significant interference with the environment beyond the facility boundary". On hearing details of the offences Judge Brennan convicted the Company and imposed a fine of €1,000. Costs of €9,000 were also awarded.

Similarly, the Food Safety Authority of Ireland enforces food safety legislation in Ireland. Since 2005 all enforcements are served by the Health Service Executive. In July 2014, for example, the HSE prosecuted Cameo Cinema Limited in Wexford for breach of EC (Hygiene of Foodstuffs) Regulations, 2006 (S.I. No. 369 of 2006). A fine of €1,000 was imposed with costs of €800 and expenses of €250.

The Health and Safety Authority can also prosecute cases summarily. On the 11th of July 2012, for example, Ross Oil Company pleaded guilty to two charges under the Safety Health and Welfare at Work Act 2005. The case related to an accident which occurred on the 24th of January 2011, when an employee slipped and fell from the roof of a tanker he was loading and suffered injury. A fine of €1,000 was imposed in Macroom District Court.

Prosecuting a trader who has broken the law is also the ultimate sanction available to the National Consumer Agency. This power is available under the National Consumer Act, 2007. In June 2014, for example, Mr Timmy Keane, a car salesman operating at VK Motors, in Harold's Cross, Dublin was convicted at Dublin District Court of a breach of the Consumer Protection Act 2007 involving providing false information in relation to a vehicle's mileage. Mr Keane was fined €500 and ordered to pay compensation of €7,000. VK Motors Ltd was also convicted and fined €500.

The primary function of the Enforcement Unit of the Office of the Director of Corporate Enforcement is to gather evidence to support the possible initiation of criminal proceedings in cases of suspected breaches of Company Law. This work includes: determining which cases should be initiated; defining the most appropriate proceedings; instructing counsel; preparing case papers; and managing case execution and considering appeals.

Principally, the above areas involve the initiation of summary prosecutions at District Court level but the enforcement unit may also assist the DPP (Director of Public Prosecutions) where cases have been referred there for decision as to whether prosecutions on indictment should be commenced.

In the *Director of Corporate Enforcement v Lauri Quinn*, 1st April, 2014, the defendant was charged with acting as auditor of four companies when not qualified to do so contrary to Section 187 (1) of the Companies Act 1990 and with completing and producing false reports as the auditors of those same companies contrary to Section 242(1) of the Companies Act 1990. The defendant pleaded guilty and was convicted of seven offences pursuant to Section 187 and a further seven charges pursuant to Section 242. A fine of €1,500 was imposed and the defendant was directed to pay prosecution costs of €1,250. Similarly, in the *Director of Corporate Enforcement v McEvoy's Self Service Drapery Limited*, 3rd February 2011, the defendant was charged with five offences under Section 202 of the Companies Act, 1990, which requires the keeping of proper books of account. On a plea of guilty, the Court convicted the defendant of five offences under Section 202 of the Companies Act, 1990, imposed fines totalling €3,000 and directed the defendant to pay prosecution costs of €1,115.

All of these administrative agencies that have entered the criminal justice arena represent more criminal regulation by the State, as well as of the State, rather than any 'hollowing out' of the State (J. Braithwaite, Neoliberalism or Regulatory Capitalism, 2005, p. 26). This enlargement in scope, however, is fragmented in nature, occupying diverse sites and modes of operation. Despite extensive powers to share information, there is no unifying strategy across the agencies or with other law enforcement institutions such as the DPP or Gardaí. Staffing levels, resources, workloads and working practices vary from agency to agency. Indeed, and apart from respective annual reports, there is little in the way of an accountability structure overseeing the policy choices of the various regulatory agencies, the manner in which they invoke their considerable investigative and enforcement powers, or the way in which information is shared between them and with the Gardaí.

2.5.2 INSTRUMENTALISM

Many aspects of regulatory crime operate in opposition to the general trend of paradigmatic criminal law which permits general defences, demands both a conduct element and a fault element, and respects procedural standards such as a legal burden of proof beyond reasonable doubt. Pure doctrines of subjective culpability and the presumption of innocence are increasingly abandoned within this streamlined regulatory framework to make up for difficulties of proof in complex cases.

The increasingly instrumental nature of criminal legal regulation is evident, for example, in the introduction of 'reverse onus' provisions that require the accused to displace a presumption of guilt. Section 383(2) of the 1963 Companies Act as amended by section 100 of the Company Law Enforcement Act, 2001, for example, states that an officer of a company 'shall be presumed to have permitted a breach by the company' unless s/he can establish that s/he took all reasonable steps to prevent it

or that by reason of circumstances beyond his control s/he was unable to do so. Previously section 383 of the 1963 Companies Act required the prosecution in such cases to prove that the officer 'knowingly and wilfully' authorised or permitted the default refusal or contravention (see G Bohan, 'Radical Change – Some Key Features of the Company Law Enforcement Act 2001' 15(1) Irish Tax Review 63-68).

Similarly, section 81 of the Safety, Health and Welfare at Work Act, 2005 now provides that in any proceedings for an offence under the Act consisting of a failure to comply with a duty or requirement to do something so far as is reasonably practicable, 'it shall be for the accused to prove' that it was not reasonably practicable to do more than was in fact done to satisfy the duty or requirement. Section 8(6) of the Competition Act, 2002 makes the directors of an undertaking, its management or anyone acting in a similar capacity liable for criminal wrongdoing under the Act. Indeed section 8(7) makes a presumption that such a person has consented, 'until the contrary is proved', to the doing of the acts by the undertaking which infringe sections 6 (the prevention, restriction or distortion of competition in trade in any goods or services) and 7 (any abuse of a dominant position in trade for any goods or services) of the Act. Section 6(2) of 2002 Act also creates a presumption that:

> 'an agreement between competing undertakings, a decision made by an association of competing undertakings or a concerted practice engaged in by competing undertakings the purpose of which is to
>
> > a) directly or indirectly fix prices with respect to the provision of goods or services to persons not party to the agreement, decision or concerted practice,
> >
> > b) limit output or sales, or
> >
> > c) share markets or customers,

has as its object the prevention, restriction or distortion of competition in trade in any goods or services in the state or in any part of the state or within the common market, as the case may be, unless the defendant proves otherwise.'

The system of justice that applies in the regulatory realm is thus more exculpatory in orientation than its ordinary criminal counterpart.

It is also evident in the instrumental fault element requirements of criminal regulation. The attachment of subjective mental element to wrongdoing in conventional criminal law is often severed in the regulatory criminal arena where objective standards of culpability apply. Section 383(3) of the 1963 Companies Act, as amended by section 100 of the Company Law Enforcement Act, 2001, for example, states that it is the duty of each company to ensure that they comply with all the requirements of the Companies Acts. As such officers are personally responsible for ensuring compliance. If it is demonstrated that a company has committed a criminal offence, the officer must prove that s/he has not permitted the breach and has taken all reasonable steps to prevent it. Similarly, section 58 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 provides that any company officer or any person purporting to act in that capacity may be convicted of an offence under the Act (such as false accounting, suppression of documents) if it is proved that the offence was carried out with his/her consent, connivance, or is attributable to his/her neglect. Under section 80 of the Health, Safety and Welfare at Work Act, 2005, where a health and safety offence has been committed by a body corporate, and that offence is shown to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of any director, that person may be prosecuted in addition to the corporate body. The seizure of the proceeds of crime too is premised on the notion

that criminals often put themselves beyond the reaches of the ordinary criminal code, by not becoming directly involved in the commission of offences and by strict enforcement of codes of secrecy. Seizure and taxation of criminal assets is a means by which to lift the veil and 'get at' the controlling and guiding minds of such criminal organisations.

Moreover, any defences that might exist in the regulatory area are also more specialised than might be the case in the general defences that apply in criminal law. For example, in competition law, it is a specific defence to show that the agreement, decision or concerted practice complained of, benefited from a declaration from the Competition Authority that the practice complained of contributes to improvement in the production or distribution of goods and services; or promotes technical or economic progress. Similarly, section 78 of the Consumer Protection Act, 2007 provides a defence where the accused 'exercised due diligence and took all reasonable precautions to avoid commission of the offence' and where, in a variety of ways, the matter was not wholly within the control of the accused. Finally, some of the general duties placed on employers under the 2005 Safety, Health and Welfare at Work Act are qualified by the term 'reasonably practicable'. This means that employers have exercised all due care when, having identified the hazards and assessed the risks at their workplaces, they have put into place the necessary protective and preventive measures, and where further measures would be grossly disproportionate (having regard to unusual, unforeseeable and exceptional circumstances).

Employing instrumentalist reasoning can give rise to difficulties, particularly in relation to constitutional justice and due process safeguards. For example in *Kavanagh v Delaney and others* [2008] IESC 1, the respondents were directors of a company at the date of the commencement of its winding up. The first respondent, D,

was the managing director of the company and the sole executive director. The fourth respondent, C, was a chartered accountant and the terms of his appointment as a non-executive director were that he should receive and review financial information from the executives of the company and attend certain directors' meetings as a non-executive director. He did not play an active part in the management of the company. According to the records produced by the directors of the company, a very large deficiency in its assets occurred during the last six months of trading for which, in the view of the applicant (the official liquidator of the company), no reasonable explanation had been given. At the time of the commencement of the winding up, initiated by C, the company was unable to pay its debts. In those circumstances the applicant was obliged by s. 150 of the Companies Act, 1990 (as amended by the Company Law Enforcement Act, 2001) to bring restriction proceedings in relation to all of the respondents and would be guilty of a criminal offence if he did not. Believing that C had acted honestly and responsibly in relation to the affairs of the company, the applicant petitioned the Director of Corporate Enforcement to be relieved of the obligation to make a restriction application in respect of C, but the Director refused the applicant's request without giving reasons for his refusal. In the Supreme Court, it was held *inter alia* that having regard to the need to respect C's constitutional rights, not only to fair procedures, but to his good name and the associated right to earn a living by the practice of his profession, it was not appropriate to restrict C in the circumstances. As Hardiman J noted:

> [T]he provisions may be regarded as draconian in the sense that, by reason of s. 150(2)(a) of the 1990 Act, a restriction order must be made against a respondent unless the court is satisfied that he has acted honestly and responsibly in relation to the conduct of the affairs of the Company and is also

> satisfied that 'there is no other reason why it would be just and equitable' to make a restriction order. The burden is placed upon the respondent to prove, not only that he has acted responsibly and honestly in relation to the Company but to prove the negative proposition '(there is no other reason...)' set out in the last citation from the Statute...
>
> I must confess to some doubt as to whether this blanket reversal of the onus of proof, including a requirement to prove a negative proposition, is consistent with fundamental fairness and constitutional justice.

In *PJ Carey Contractors Limited v DPP* [2012] IR 234 Section 6 of the Safety, Health and Welfare at Work Act 1989 provides, inter alia, that it shall be the duty of every employer to ensure, so far as is reasonably practicable, the safety, health and welfare at work of all his employees and, at s. 6(2)(d), the provision of systems of work that are planned, organised, performed and maintained so as to be, so far as is reasonably practicable, safe and without risk to health. Section 50 of that Act provides that in any proceedings for an offence consisting of a failure to comply with a duty or requirement to do something so far as is practicable or so far as is reasonably practicable, or to use the best practicable means to do something, it shall be for the accused to prove (as the case may be) that it was not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty or requirement, or that there was no better practicable means than was in fact used to satisfy the duty or requirement. The applicant was charged with certain offences contrary to the Act of 1989, in particular under s. 6, following the collapse of a trench on a building site which had resulted in the death of an employee. During the trial uncontroverted evidence was adduced that the system of work adopted was, as far as was reasonably practicable, safe and without risk. An application was made by the applicant to

withdraw the entire case from the jury on the basis that there was no case to answer given that all the evidence called from persons who were present at the time of the accident favoured the accused. Some of the charges were withdrawn. However, the applicant was convicted of offences contrary to s. 6 of the Act of 1989 regarding the alleged failure of the accused to provide a safe system of work. The prosecutor relied on the doctrine of *res ipsa loquitur* and on s. 50 of the Act of 1989 submitting that the provision reversed the legal burden of proof onto the applicant requiring it to prove that it had adopted a safe system of work. The applicant appealed against the conviction. It was held by the Court of Criminal Appeal in allowing the appeal and setting aside the conviction, that the offence under s. 6 (2)(d) of the Act of 1989 was not complete merely on proof that the trench had collapsed. It required proof of a failure to provide a safe system of work. It was also held that s. 50 of the Act of 1989 created a reversed burden of proof which cast an evidential burden only on the accused and not a substantive onus of legal proof, and that that evidential burden had been discharged by the accused.

Hardiman J stated:

> It appears to me that, having referred to s. 50 of the Act of 1989, the trial judge then misinterpreted its purport so as to cast a substantive onus of legal proof upon the defendant...It appears to me that the foregoing passages envisage an obligation on the defendant to explain certain things and suggests the inadequacy of such explanation. But that is a misconstruction of the effect of s. 50 which is merely to cast an evidential, and not a legal or substantive burden on the defendant. I believe that this was an error of law by the trial judge and, that if this error had not occurred, it would have been manifest that the defendant was entitled to a direction.

Aside from reverse onus provisions, the privilege against self-incrimination may also give rise to difficulties. In *Saunders v UK* (ECHR) (1996) 23 EHRR 313, the applicant was convicted for fraud in the connection of the takeover by Guinness of Distillers. Section 434 of the Companies Act, 1985 compelled him, upon pain of conviction, to furnish information to inspectors that could be admitted as evidence against him in a criminal trial for participating in illegal share support schemes. The Court held by 16 to 4 that the use at Saunders's trial of statements obtained from him by the Department of Trade and Industry violated Article 6 of the European Convention on Human Rights, particularly having regard to the privilege against self-incrimination. Closer to home, in *Re National Irish Bank* [1999] 3 IR 145, inspectors were appointed under the Companies Acts, 1990 to examine the affairs of National Irish Bank. Section 10 of the Act places a duty on officers of the company to cooperate with inspectors and to produce documents and answer questions. Section 18 provided that an answer given by a person 'may be used in evidence against him'. In the Supreme Court it was held that section 10 did not allow evidence obtained in such circumstances to be admitted in a subsequent criminal trial. Section 29 of the Company Law Enforcement Act, 2001 now immunises the answers given to an authorised officer from being used in any subsequent criminal proceedings. Similarly, section 15(10) of the Criminal Justice Act 2011 provides that any statement or admission made by a person pursuant to an order under that section is not admissible as evidence in subsequent proceedings brought against the person for an offence, other than an offence under subsection (15), (16) or (17) of the Act.

In *Environmental Protection Agency v. Swalcliffe Limited* [2004] IEHC 190 the accused was a company which held a waste licence, subject to certain conditions,

including, inter alia, the requirement to keep certain records. A prosecution was brought for alleged breaches of the said licence. The prosecution sought to adduce into evidence a waste licence audit report, the contents of which were based on records maintained by the accused. The accused argued that the report and the oral evidence to be adduced thereon were inadmissible on the basis that the records upon which the material part of the audit was based were not maintained voluntarily by the accused but were maintained pursuant to the requirements of the Waste Management Act 1996. The accused argued that to the extent that any of the records contained details which suggested that the accused had committed a criminal offence under the Act of 1996, it amounted to an involuntary confession and that there was no provision under the Act of 1996 permitting the admission of such involuntary confessions. In the High Court, Kearns J held that records brought into being as part of a scheme of regulation are admissible at trial and do not violate the principle against self-incrimination.

> In my view the privilege against self-incrimination is not involved at all in this case. The rationale for the privilege is clear. It is to protect against unreliable confessions and to protect against abuses of power by the State. Quite clearly there is both a societal and individual interest in achieving both of these protections which are linked to the value placed by society upon individual privacy, personal autonomy and dignity…In applying for a waste licence, the accused must be taken as having freely accepted the conditions attaching to the licence, which formed part of the entire package under the regulatory scheme. It was the accused's own free choice to participate in the particular activity and at the time they chose to do so they were well aware of their

record keeping obligations and of the penalties for non-compliance with the requirements of the Act of 1996.

In a recent case, *DPP v Collins* (Unreported, Circuit Court, 27 September 2007), the Revenue's attempt to produce what appeared to be compelled documents in a criminal prosecution was held to infringe the accused's right to the privilege against self – incrimination. He had been sent an initial letter in relation to undeclared tax liabilities and a bogus non-resident account which stated: 'failure to comply...may result in ...a referral for investigation with a view to prosecution'. If he complied, it was indicated that he would be dealt with under section 1086(2) of the Tax Consolidation Act 1997, and would not be subject to criminal law. The accused made a disclosure and the Revenue authorities then sought to use some of the evidence therein as part of the criminal prosecution. This was held to violate his right to the privilege against self-incrimination (Duggan, Disclosure to Revenue and the Privilege Against Self-Incrimination, (2008) ITR 70).

In addition, it is felt that *mens rea* 'must be presumed to be a necessary ingredient of all serious offences' (*CC v Ireland and Others* [2006] IESC 33; *The Employment Equality Bill 1996* [1997] 2 IR 321). In *Brady v Environmental Protection Agency* [2007] IEHC 58, Charleton J at para 41 noted: 'It is difficult to see offences of absolute or strict liability being compatible with the constitutional scheme where they go beyond the regulation of society through the imposition of small penalties based

upon absolute or strict liability.' There is also, however, some Irish and ECHR support for the view that a defence of due diligence will suffice to justify a regulatory offence of strict liability. In *CC v Ireland and Others* [2006] IESC 33, for example, this was suggested by Hardiman J in passing (though he did not rule specifically on the matter). In particular, he referred to the cases of *Regina v City of Sault Sainte Marine* [1978] 85 DLR 161 and the dissenting judgment of Keane J in *Shannon Regional Fisheries Board v Cavan County Council* [1996] 3 IR 267. Moreover, the decision of *Shannon Regional Fisheries Board v Cavan County Council* [1996] 3 IR 267, which held that there was no requirement of a *mens rea* element for regulatory offences, has not been expressly overruled by the judgment in *CC*. In terms of ECHR jurisprudence, in *Salabiaku v France* (1998) EHRR 379, the European Court of Human Rights held that 'the contracting States may, under certain conditions, penalize a simple or objective fact as such irrespective of whether it results from criminal intent or from negligence'. It went on to note, however, that presumptions of fact or law should be confined within 'reasonable limits'. This may provide some degree of leeway for crimes that can be classified as regulatory in nature.

Another difficulty is the emphasis that the law of evidence traditionally places on oral testimony. This may sometimes pose a dilemma in the arena of regulatory wrongdoing where documentary trails may form a central part of an investigation. Though the Criminal Evidence Act, 1992 provides for an inclusionary approach to documentary evidence in criminal proceedings, this has not as of yet been extended to civil proceedings. In practice, however, lawyers in the civil context routinely agree in advance of the hearing to admit expert reports and documentary information, as a matter of procedural convenience and mutual benefit. For example, in *Shelley-Morris*

v Bus Átha Cliath [2003] 1 IR 232, a personal injuries action, the Supreme Court noted that it had been agreed between the parties that medical reports from the United Kingdom would be received into evidence in substitution for oral evidence. The Bankers' Books Evidence Act, 1879 as amended provides for the admissibility of copies of entries from the books and records of banks against any person as *prima facie* evidence. There is a wide definition of bankers' books in the 1879 Act, as amended, and this includes any records used in the ordinary course of the business of a bank or used in the transfer department of a bank acting as a register of securities. It should also be noted that the principles and rules of the law of evidence apply traditionally to hard-copy, paper-based documents. Electronic and automated documentary evidence currently poses more difficulties. A recent Consultation Paper on *Documentary and Electronic Evidence* (LRC CP 57 – 2009) recommends that documentary evidence should be admissible in civil and criminal proceedings where the court is satisfied as to its relevance and necessity. It also recommends that a technology-neutral approach should be adopted so that the term documentary evidence should, in general, apply to traditional paper-based documents and to electronic documents.

Finally, in defining a crime in Ireland in cases such as *Melling v O'Mathghamhna* [1962] IR 1, the Irish courts have adopted a very traditional approach, emphasising indicia such as procedural characteristics (powers of arrest, detention, bail etc.), due process safeguards (the presumption of innocence, the right to liberty, the right to a jury trial), and punitive elements. As McGrath (J McGrath, 'The Colonisation of Real Crime in the Name of All Crime' in Kilcommins and Vaughan, eds, *Regulatory Crime in Ireland*, Dublin: First Law, 60-61) notes, these 'features are often associated with traditional criminal offences. This analysis has marginalised corporate

criminality, often enforced by regulatory law, from the crime debate… *Melling* and the cases following it speak to real crime so attempting to make conventional crime indicia fit into regulatory contexts is inappropriate. The jurisprudence needs to be re-evaluated and a new approach must be found.'

2.5.3 INFORMATION SHARING AND MANDATORY REPORTING

What also appears to be emerging in recent years is the increasing adoption of a more variegated approach straddling both civil and criminal jurisdictions to the detection, investigation and punishment of offences. For example, the organisational make-up of the Criminal Assets Bureau comprises Revenue Commissioners, Department of Social Community and Family Affairs officials and Gardaí, all directing their respective competencies at proceeds from criminal activities. More specifically, section 17 of the Company Law Enforcement Act of 2001, for example, permits the Director of Corporate Enforcement to share information with other prosecuting authorities, as well as Tribunals of Inquiry, the Revenue Commissioners and An Garda Síochána. In some instances individuals are required to become 'information reporters'. Section 42 of the *Criminal Justice (Money Laundering and Terrorist Financing) Act* 2010 requires the financial services industry and professional service providers (including auditors, accountants, tax advisers, legal practitioners) to report suspicious transaction to the Garda Siochana and the Revenue Commissioners (S Horan, *Corporate Crime*, 2011, Bloomsbury Professional,, pp. 1529-1540). Similarly, section 192(6) of the Companies Act, 1990, as amended, requires that where a disciplinary tribunal of a recognised body of accountants has reasonable grounds for believing that an indictable offence has been committed by a person while the person was a member of

the body, the body shall inform the Director of Corporate Enforcement. A similar provision exists under section 194, as amended, as regards the auditors of a company who must notify any failure to keep proper books of account (*Re Bovale Developments; DCE v Bailey* [2008] 2 ILRM 13). Section 192 of the Companies Act 1990, as amended by section 73 of the Company Law Enforcement Act of 2001, provides that whenever disciplinary tribunals of accountancy bodies have reasonable grounds for believing that an indictable offence has been committed by one of their members, it must report the suspicion to the Director of Corporate Enforcement. Auditors are also required, when carrying out an audit of a company, to report suspicions of indictable offences having been committed under the Companies Acts to the Director of Corporate Enforcement, and provide details on how the opinion of a suspicion was formed (Section 194, Companies Act 1990). Section 299 of the Companies Act 1963, as amended by section 51 of the Company Law Enforcement Act 2001, requires a liquidator in the course of a voluntary winding up of a company to report any suspected criminal activity of company officers to the DPP and the Director of Corporate Enforcement. Section 59 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 provides that any professional assisting in the preparation of figures or computations which might be used in the preparation of accounts, has a duty to report acts of theft, making gain or causing loss by deception, obtaining services by deception, fraud or deception through the use of a computer, false accounting and suppression of documents. A significant broadening in the obligation to disclose information is contained in the *Criminal Justice Act 2011*. Section 19 of the Criminal Justice Act 2011 makes it an offence for a person to fail to disclose information to An Garda Síochána as soon as practicable and without reasonable excuse, which the individual knows or believes might be of material assistance in "(*a*)

preventing the commission by any other person of a relevant offence, or (*b*) securing the apprehension, prosecution or conviction of any other person for a relevant offence". Section three of the Act defines "relevant offence" broadly including offences relating to banking and finance, company law, money laundering, theft, fraud, bribery, corruption, competition, consumer protection, cybercrime and tax collection, with 30 offences specified in Schedule 1. Upon conviction on indictment a defendant may be subject to a maximum prison sentence of five years or a fine or both.

The difficulties of prosecuting regulatory crime are well documented. In addition to facilitating exchange of information and compelling certain parties to become information reporters, the authorities are increasingly also seeking to protect and encourage witnesses to come forward and provide evidence. 'Whistleblowers' have been crucially important in Ireland on lifting the lid on various abuses such as the care of the elderly and corruption in banks (Transparency International Ireland, *An Alternative to Silence: whistleblower protection in Ireland*, 2010 Dublin: Transparency Ireland). Encouraging such witnesses to provide information ordinarily takes two forms: protection and/or immunity. In relation to protection, section 6 of the *Unfair Dismissals Act* 1977, for example, provides that a dismissal will be deemed to be unfair if it was brought about as a result of the employee making a complaint to a prosecuting authority in which he or she was likely to be a witness. Similarly section 27 of the *Safety, Health and Welfare at Work Act* 2005, section 87 of the *Consumer Protection Act* 2007, and section 26 of the *Employment Permits Act* 2006 provide that an employer is not permitted to penalise an employee for reporting health and safety, consumer or employment permit breaches respectively. Similarly, section 20 of the Criminal Justice Act 2011 provides protection for employees against penalisation or

threatened penalisation for making a disclosure, giving evidence in relation to a disclosure or for giving notice of an intention to disclose information in relation to a "relevant offence" as defined in the Act. However, there is an exemption included in the act to ensure that an employer is not prevented from carrying on the business in an efficient manner or taking actions necessary for economic, technical or organisational reasons in some circumstances.

More generally, the *Protected Disclosures Act* 2014 requires all public sector bodies in Ireland to put in place whistleblowing policies which meet the requirements of the Act. Where private sector businesses have policies in place, they need to review them to ensure that they are aligned to the requirements of the Act. The Act protects 'workers' in all sectors who make a 'protected disclosure'. The term 'worker' includes employees (public and private sector), contractors, trainees, agency staff, former employees and job seekers. 'Protected disclosure' means disclosure of relevant information, which in the reasonable belief of the worker tends to show one or more relevant wrongdoings and came to the attention of the worker in connection with their employment. 'Relevant wrongdoings' include the commission of an offence, non-compliance with a legal obligation, health and safety threats, misuse of public monies; mismanagement by a public official; damage to the environment, or concealment or destruction of information relating to any of the foregoing. The Act protects whistleblowers from dismissal for having made a protected disclosure. The worker can be awarded compensation of up to five years' remuneration for unfair dismissal on the grounds of having made a protected disclosure. Other protection measures provided for in the Act include: protection from penalisation by the employer; civil immunity from action for damages and a qualified privilege under defamation law;

and a right of action in tort where a whistleblower or a member of his family experiences coercion, intimidation, harassment or discrimination at the hands of a third party; protection of his/her identity (subject to certain exceptions).

Immunity programmes are not as universal. The Competition Authority, however, does operates a Cartel Immunity Programme, which provides immunity from criminal prosecution for suspected individuals who are willing to cooperate and testify on behalf of the prosecution (P Gorecki and D McFadden, 'Criminal Cartels in Ireland: The Heating Oil Case, 11 European Competition Law Review 2006, 631-640).

2.5.4 POWERS

Very wide powers of entry, inspection, examination, search, seizure and analysis are given to some of these agencies. For example, under section 64 of the Health and Safety Act, 2005, health and safety inspectors are, *inter alia*, entitled to enter any place with the consent of the occupier or with a warrant and inquire into, search, examine and inspect the place and any work activity; require records to be produced; inspect and take copies of such records; remove and retain records; and require the employer or any employee to give the inspector any information that the inspector may reasonably require for the purposes of any search, examination, investigation, inspection or inquiry. In relation to company law, section 19 of the Companies Act 1990 empowers the Director of Corporate Enforcement to require company officers to produce for inspection specified books, and documents where there are circumstances which suggest that fraud, illegality, or prejudice may have occurred. The constitutionality of the provision was upheld in *Dunnes Stores Ireland Co v Ryan* [2002] 2 IR 60. Section 20(2) of the Companies Act, 1990, as amended, provides that

a search warrant may be issued to authorise the Director of Corporate Enforcement to enter and search premises and seize and retain any material information found on the premises or in the custody or possession of any person found on the premises.

Similarly, section 30 of the Competition Act 2002 permits the Competition Authority to summon witnesses to attend before it, examine witnesses attending, and require such witnesses to produce any document in their power or control. Section 45(4) of the same Act permits the Competition Authority to obtain a search warrant to enter by force and seize, from a premises of suspected undertakings (and the homes of individuals involved in their management) any books, records and documents relating to the activity of an undertaking. Persons on the premises may also be required to answer certain questions relating to the activity engaged in by the undertaking. . In respect of revenue offences, the Revenue authorities has very broad powers of search and seizure and can enter a business/dwelling where a trade is being carried on without a warrant (section 905 Tax Consolidation Act 1997)Section 905(2A) of the same Act provides for the issuance of search warrants to search any premises and section 900 provides very broad powers to require the production of books, records, other documents, which may contain information relevant to liability (Considine, J and Kilcommins, S 'The Importance of Safeguards on Revenue Powers; another perspective' Irish Tax Review 2006, 19(6): 49-54).. In *Competition Authority v The Irish Dental Association* [2005] IEHC 361 the defendant was a company limited by guarantee which had about 1200 members being practising dentists. The plaintiff commenced proceedings against the defendant in respect of alleged breaches of the Act, seeking certain declarations as well as injunctive relief. In the course of those proceedings, the plaintiff obtained a search warrant authorising it to search the

defendant's business premises. The warrant wrongly made reference to the defendant being involved in the business of selling, supplying or distributing motor vehicles. The plaintiff carried out the search and seized certain documents belonging to the defendant. It was common ground that the defendant had no connection whatsoever with such a business. The defendant commenced proceedings against the plaintiff on the basis that the documents so obtained had been obtained in breach of the defendant's constitutional rights and its right to privacy, with the result that they should be declared inadmissible.

The court ruled:

> Where the evidence in question was obtained purely by illegal means, there was a discretion for the court to exercise which involved balancing competing interests, unless there existed also within the circumstances of that case, 'extraordinary excusing circumstances'. If on the other hand, such evidence also involved a conscious and deliberate violation of one's constitutional rights, then in the absence of extraordinary excusing circumstances, that evidence should be disallowed.

Applying established principles, it was clear that the plaintiff had constitutional rights and that such rights of freedom and expression, most certainly and probably also those of privacy, were not too remote so as to exclude their application to the present circumstances. In the circumstances, given that the search warrant was illegal and given the existence of those rights, the activities carried out by the plaintiff on the occasion in question, had constituted a breach of the defendant's constitutional rights. Accordingly, the court had no discretion with regard to the material in question.

More recently, the Criminal Justice Act 2011 gave power to An Garda Síochána to apply to the District Court for an order compelling the provision of documents (recorded in any form) or information "by answering questions or making a statement containing the information" (s. 15(1)) which may assist in the investigation of a "relevant offence" in certain circumstances. As mentioned previously, "relevant offence" is defined broadly including offences which may not typically be considered to be white collar offences such as the offence of theft under section 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001.

Part Two of the same Act, the Criminal Justice Act 2011, also includes interesting provisions relating to powers of detention. Section 7(a) amends section 4 of the Criminal Justice Act 1984 and gives investigators the opportunity to suspend a period of detention of a person detained in respect of a "relevant offence" where there are "reasonable grounds for believing that it is necessary for the purpose of permitting enquiries or investigations to be made for the further and proper investigation of the offence concerned". Detention may be suspended twice; however, not more than four months may elapse from the date the detention is first suspended. Section 8 provides the Gardaí with powers to arrest and return suspects for continuation of detention where the individual has not returned for questioning as required under the Act and makes it an offence to fail to return to a Garda station for a further period of detention for questioning. The Act also contains provisions relating to rest periods between midnight and 8am (s 7(c)) and the right of access to legal advice (s9); however, these provisions have yet to be commenced.

2.5.5 SANCTIONING

There is also some evidence of a possible drift towards a more punitive approach to regulation (R Baldwin, 'The New Punitive Regulation' 67(3) M.L.R. 2004: 351-383). Traditionally it had been said that the focus of the sanctions for many of these regulatory offences was more 'apersonal' in nature than their ordinary counterparts. The argument was that 'these were not real crimes to which stigma should attach, but were rather in the nature of administrative regulations with non-stigmatising penalties such as fines' (N Lacey, 'Criminalisation as Regulation: The Role of Criminal Law' in C Parker et al, eds, *Regulating Law* Oxford: OUP, 2004, 161). The traditional lack of a *mens rea* requirement operated as the 'doctrinal marker of these defendants less than fully criminal status from a social point of view' (*ibid*). But regulatory agencies have increasingly grown considerable teeth as regards prosecution. The Law Reform Commission published a report on corporate killing in 2006 and called for the introduction of two new offences: a statutory offence of corporate manslaughter for corporate entities; and, a secondary offence (grossly negligent management causing death) for corporate officers who play a role in the commission of the offence (see also D Aherne, 'Corporate Killing in Ireland – a new paradigm' 22 I.L.T. 2004, 235-239).

More specifically, section 78 of the Safety, Health and Welfare at Work Act, 2005 now imposes on conviction on indictment for an offence under the Act a fine not exceeding €3 million or imprisonment for a term not exceeding two years, or both. In *DPP v O'Flynn Construction Company Limited* [2007] 4 IR 500 the Circuit Court imposed a fine of €200,000 on O'Flynn Construction Company Limited which pleaded guilty to two offences contrary to the Safety, Health and Welfare at Work Act, 1989, namely failing to conduct its undertaking in such a way as to ensure so far as is reasonably practicable that persons not in its employment who might be affected

thereby were not exposed to risks to their safety or health, in contravention of s. 7(1) of the Safety, Health and Welfare at Work Act, 1989, and failing to signpost and lay out so as to be clearly visible and identifiable the surroundings and perimeter of a construction site, in contravention of para 18 of the fourth schedule of the Safety, Health and Welfare at Work (Construction) Regulations, 1995, in contravention of regulation 8(1)(g) of the said Regulations, contrary to s. 48(1)(c) of the Safety, Health and Welfare at Work Act, 1989. The incident giving rise to the two charges occurred at what was known as Mount Oval Village in Rochestown in Cork. In September 2001 it was a very large construction development situated on over 100 acres on which it was planned that 9 separate housing estates, totalling 850 houses and some apartments plus a shopping complex would be built. Boys went into the building site and a drum of wood preservative exploded after being set on fire by some of the boys. A 9 year old boy died. O'Flynn construction appealed against the severity of the penalty. The accused submitted that the fencing of the construction site was, at the time, reasonable in all circumstances. The prosecution accepted that the breaches of the statutory and regulatory provisions governing safety at the construction site, were not a direct cause of the tragic death of the deceased, but were significant contributing factors. In dismissing the appeal, Murray CJ noted:

> The most serious lapse on behalf of the applicant company was the delivery onto the site of a drum containing hazardous material and leaving it placed in the open without securing it against interference by persons such as children or teenagers who ventured on to it. In the circumstances the Court is satisfied that the learned Circuit Court Judge was perfectly entitled to take a serious view of the breach by the company of the relevant statutory and regulatory provisions.

> The breach was aggravated by the fact that it played a significant role in the combination of circumstances that led to the fatality…

Having taken the mitigating circumstances into account the trial judge was nonetheless entitled and indeed bound to impose a penalty that reflected the seriousness of the offence so that it applied appropriate punitive and deterrent elements. Among the elements to be taken into account in assessing the severity of a fine, whether imposed on an individual or a corporate entity, is the wealth or resources of the person or company concerned. As was found by the learned trial judge the defendants in this case are a substantial company who were involved in a very substantial construction project. It could not be said to be disproportionate to their means and resources.

On conviction on indictment for competition law offences, undertakings are liable to a fine not exceeding whichever of the following amounts is the greater, namely €5 million or ten per cent of the turnover of the undertaking in the financial year ending in the 12 months prior to conviction. Individuals are subject to the same fine limits and/or a term of imprisonment not exceeding ten years. (See section 8 of the Competition Act, 2002 as amended). Section 240 of the Companies Act 1990 (as amended by section 104 of Company Law Enforcement Act, 2001) sets out the penalties applicable for for company law offences and s. 297 of the Companies Act, 1963, as amended, s. 242 of the Companies Act, 1990, and s. 114 of the Companies Act, 1990 set out the penalties applicable for the commission of offences of fraudulent trading, furnishing false information, and insider dealing respectively.

While, McGrath noted in 2012 that "[c]orporate crime is rarely considered to be as harmful as ordinary crime" (Irish Criminal Law Journal 2012, 3, 71-79, p72), a series of recent cases may indicate an increasing willingness to imprison individuals convicted of serious corporate crime (ibid, p75). In late March of 2009, Mr Justice McKechnie, in a judgment in the Central Criminal Court which considered competition law abuses by an association of Citroen car dealers, noted: 'These [offences] stifle competition and discourage new entrants, damaging economic and commercial liberty…[T]hey remove price choice from the consumer, deter consumer interest in product purchase and discourage variety. They reduce incentives to compete and hamper invention…If previously our society did not frown upon this type of conduct, as it did in respect of more conventional crime, that forbearance or tolerance has eroded swiftly, as the benefits of competition law become clearer…Therefore it must be realised that serious breaches of the code have to attract serious punishment [which included imprisonment]'. See *DPP v Duffy and Duffy Motors* (Unreported, Central Criminal Court, 23rd March 2009). See also *DPP v Manning* (Unreported, High Court, 9th February, 2007).

In *DPP v. Paul Murray*, [2012] IECCA 60, a case concerning social welfare fraud, Finnegan J, delivering judgment for the court, emphasized the importance of deterrence in sentencing decisions in cases involving revenue fraud. It was suggested

> "for the future guidance of sentencing courts that significant and systematic frauds directed upon the public revenue - whether illegal tax evasion on the one hand or social security fraud on the other - should generally meet with an immediate and appreciable custodial sentence".

This judgment proved controversial and in *Paul Begley v. DPP* [2013] IECCA the CCA rejected the contention that cases involving tax evasion should be categorised separately from other offences for sentencing purposes and "should not be read as suggesting the establishment of any parallel rules on sentencing, relative to such crimes or as contemplating any significant adjustment on how courts should value or weigh genuine factors in mitigation" [44]. Instead,

> "there will be some cases where an immediate sentence is justified and others where it will not be. Everything will depend on the crime, the circumstances of its commission and the personal situation of the accused. In all cases however the ultimate conclusion will be directed by general principles." [43].

Ultimately, Mr. Begley's 6 year sentence for offences relating to the fraudulent evasion of customs duty was reduced to two years by the CCA as the trial judge had failed to properly consider or weigh the mitigating factors in respect of which Mr. Begley was entitled to credit.

Another notable high profile case in which a lengthy custodial sentence was imposed was that involving former solicitor, Thomas Byrne, who was convicted of 52 offences including theft, forgery and using a false instrument and sentenced to 16 years imprisonment, with four years suspended. (Irish Times 2nd December 2013). However, a custodial sentence was not imposed in the high profile case in 2014 involving two former Anglo Irish Bank directors, Pat Whelan and Willie McAteer. Upon conviction of offences relating to the illegal purchase of Anglo Irish shares

under section 60 of the Companies Act 1963 the men were sentenced to 240 hours community service (Irish Times, July 31st, 2014). Judge Nolan decided that "[i]t would be most unjust to jail these two men when I feel that a State agency [the financial regulator] had led the two men into error and illegality" (Irish Times, April 30th 2014).

Though all of this constitutes evidence of a drift towards the greater use or threatened use of criminal sanctions, it should not be pushed too far. The area of regulatory crime still, by and large, remains predominantly orientated towards a compliance model of enforcement. This is facilitated by a wide range of strategies that favour the employment of negotiation, consultation and persuasion, rather than an exclusively sanctioning approach that would potentially polarize the various parties involved. These strategies include audits, warning letters, notices, injunctions, guidance, binding directions, and the suspension and revocation of licences. The Consumer Protection Act, 2007, for example, permits the National Consumer Agency to issue prohibition orders to businesses, to take undertakings of compliance, to issue compliance notices and fixed payment penalties, in addition to prosecution functions. (See A O'Neill, 'The Consumer Protection Act 2007 – Enforcing the New Rules' 26 I.L.T. (2008) 46). In 2007 the National Consumer Agency 'dealt with thousands of complaints…, had contacts with hundreds of retailers over alleged pricing offences, but issued only three fixed penalty notices and made sixteen prosecutions'.

In 2008, the Office of the Director of Corporate Enforcement (ODCE) issued 24,000 copies of their publications, closed 850 cases on an administrative basis, made a final determination on 280 initial liquidator reports, secured 20 summary convictions, secured 20 disqualifications, and one case was successfully prosecuted by the DPP following an ODCE investigation. (P Appleby, 'Compliance and Enforcement – the

ODCE perspective' in Kilcommins and Kilkelly, eds, *Regulatory Crime in Ireland* 2010, p. 186). The Environmental Protection Agency (EPA) also resolves most issues of non-compliance without the need for further enforcement actions. When compliance cannot be achieved, administrative and criminal sanctions can be employed including notifications of non-compliance In the years 2009-2012, there were on average 900 court prosecutions brought each year and 12,000 enforcement actions. (EPA, *Focus on Environmental Enforcement in Ireland: a report for the years 2009-2012*, 2014, p. 2)

Similarly, the Safety, Health and Welfare at Work Act, 2005 allows the Health and Safety Authority to take actions where statutory contraventions are observed or where there is a risk of serious personal injury. These actions include:

- The issuing of an Improvement Direction in relation to activities to which the inspector considers may involve risk to safety or health of persons. An employer is required to respond with an Improvement Plan.
- The issuing of an Improvement Notice stating the inspector's opinion that a duty holder has contravened a provision of an Act or Regulation, and requiring that the contravention be addressed within a certain time period of not less than 14 days.
- The issuing of a Prohibition Notice where an inspector is of the opinion that an activity is likely to involve a risk of serious personal injury to any person. This notice takes effect immediately from when the person, on whom the notice is served, receives the notice.
- The issuing of an Information Notice requiring a person to present to the HSA any information specified by the notice.

- The taking of summary proceedings in the District Court in relation to an offence under any of the relevant statutory provisions.
- The preparation of evidence so that the Director of Public Prosecutions can initiate proceedings on indictment for hearing in the Circuit Court.

All of these ensure that prosecutions remain relatively rare, employed as a last resort mechanism. As Professor Colin Scott ('Regulatory Crime: History, Functions, Problems, Solutions' in Kilcommins and Kilkelly, eds, *Regulatory Crime in Ireland*, 2010, at 73) has recently noted:

> The enforcement strategies of enforcement agencies have been arrayed in a pyramidal approach to enforcement in which the object is to maintain as much enforcement activity as possible at the base of the pyramid…This approach is said to be effective not only with businesses which are orientated to legal compliance, but also with the 'amoral calculators' for whom compliance becomes the least costly path when they know there is a credible threat of escalation to more stringent sanctions.

2.5.6 HYBRID ENFORCEMENT MECHANISMS

Finally, another striking feature of this regulatory infrastructure is the proliferation of hybrid enforcement mechanisms that can be employed by the agencies or, on occasion, by private parties. These mechanisms have also contributed to a more general 'blurring of legal forms' (A Ashworth, 'Is the Criminal Law a Lost Cause' 116 L.Q.R. 2000, 237), conflating the functional distinctions that exist between criminal and civil law, and between regulatory wrong-doing and ordinary wrong-doing. For example, and apart from the possibility of a criminal prosecution by the

Competition Authority, private parties can seek to initiate civil enforcement of competition law under section 14(1) of the Competition Act, 2002. Section 8(10) of the same Act provides that an action under section 14 may be brought whether or not there has already been a criminal prosecution in relation to the matter concerned and, in addition, a section 14 action will not prejudice the initiation of any future prosecution. Indeed, the Competition Authority itself can also seek to bring a civil action under section 14(2) of the Act (D McFadden, 'Two Tiers Equals Full Suite: Civil Fines Complement Criminal Enforcement' in Kilcommins and Kilkelly, eds, *Regulatory Crime in Ireland*, 2010, 210). Similarly, the Office of the Director of Corporate Enforcement can take civil or criminal enforcement actions. Civil enforcement actions include the use of restriction and disqualification orders.

This fragmentation in responses to a breach of a regulatory offence can give rise to difficulties having regard to the principled protections generally afforded to those accused of crime. To give one instance, the Revenue may proceed against a tax defaulter through the criminal courts under section 1078 of the Taxes Consolidation Act, 1997 whilst also exercising its considerable civil powers to collect tax and impose civil penalties (fixed penalties and tax geared penalties) under section 1053 of the same Act. The latter penalties are available 'without prejudice to any other penalty to which the person may be liable'. This, as Tom O'Malley notes, can pose a 'problem for any sentencing system claiming to be guided by proportionality standards' (*Sentencing Law and Practice*, 1st ed, 2000, 128).

For example, in the *People (DPP) v Redmond* [2001] 3 IR 390, the defendant, who had previously worked as a senior official in local government in Dublin, had been charged with ten counts of failing to make tax returns between 1989 and 1997. The prosecution case was that the defendant failed to disclose about £249,000 of income

during this period. The defendant was found guilty and the trial judge imposed a total fine of £7,500 in respect of the ten counts. The Director of Public Prosecutions appealed on the basis that this sentence was unduly lenient having regard to the gravity of the offences. In determining the proportionality of the punishment, the Court of Criminal Appeal noted that the defendant had, since his arrest, settled his civil revenue liability by paying a total sum of £782,000 to the Criminal Assets Bureau which was acting for the Revenue Commissioners. This figure constituted the tax liability owing in relation to the criminal charges and other unspecified liabilities including interest and penalties. In order to meet this civil liability, Redmond had to sell the family home. The Court of Criminal Appeal noted that this full settlement figure was not broken down into various headings including the amount claimed in penal interest or revenue penalties. This was regrettable since information of this kind was important in determining the appropriate criminal sanction. In refusing to increase the criminal penalty, the court noted:

> Since proportionality is a key principle of sentencing, the court would endeavour to consider the cumulative sum of penalties in assessing the amount of the final one. The revenue penalties may vary, in particular with whether default in compliance is negligently or fraudulently caused. Such penalties in certain circumstances can exceed three times the difference between the tax paid and the tax actually payable. … [T]hese are penalties which will be imposed on top of the primary obligation of every tax payer to pay the correct amount of tax. Similarly, a penal rate of interest may be applied where income tax has not been paid as a result of a fraud or neglect of the tax payer. This, too, is in the nature of a penalty. It is plainly not possible for a sentencing court in a case such as this to ignore the fact that other penalties, which may

> be much greater in amount than the cumulative sum of the maximum fines for these charges, have already been paid. It is therefore most unfortunate that the evidence does not extend to a statement, even approximate, to the amount of penalties so paid, or the defaults in respect of which they were imposed.

Similarly, in March 2009, a building contractor, Colm Perry, who evaded €500,000 tax over eight years was jailed for 20 months by Judge Martin Nolan at Dublin Circuit Criminal Court. Prior to sentence he settled €499,998 of unpaid income tax and VAT returns with the Revenue Commissioners last week, but had a further €925,000 of outstanding interest and penalties accumulated on the failed returns from 1996 to 2004. Judge Nolan accepted the submission that Perry was 'a hard working, decent man' but said he had to impose a custodial sentence to reflect the scale of his eight-year tax evasion. On appeal, Hardiman J, delivering the judgment in the Court of Criminal Appeal, allowed the appeal and noted:

> There is no doubt that the financial penalty of the same amount as the tax, in round figures half a million euros, is in the nature of a punitive consequence. We do not find evidence that the learned trial judge sufficiently considered it as such. There was a dispute in argument as to whether the interest was a punitive consequence. In our opinion in the present time, interest running at the rate of between 9% and 12% is undoubtedly punitive. This is a time when people, even with relatively substantial bank deposits, may struggle to achieve a quarter or even a smaller fraction of that. It is difficult to think of interest at the rate of 9% to 12% being imposed upon one as anything other than at least partially a punitive factor. We desire to emphasise the point that of course Mr. Perry's liability to pay interest and taxes is unaffected by the Court's decision in this case.

More recently in *Paul Begley v. DPP* [2013] IECCA the court held that the restitution programme entered into by the defendant which included the payment of a lump sum of circa €219,000 to Revenue in December 2009 with a payment schedule of between €24,000 and €33,000 per month thereafter until the outstanding balance is fully discharged was a factor to be considered in mitigation.

The confusion that can arise between civil, administrative and criminal matters was also illustrated in *Registrar of Companies v District Judge David Anderson and System Partners Limited* [2005] 1 IR 21. System Partners Limited was late in filing its tax returns for the years 2000 and 2001. As a result, it had to pay a late filing fee of €1,200 for the year 2000 and €379 for the year 2001. Ordinarily the fee payable by a company if it filed its returns on time was €30. Subsequent to the late filing of the returns and the payment of the associated late filing fees, two prosecutions pursuant to s. 125 of the Companies Act, 1963, as amended by s. 59 of the Company Law Enforcement Act, 2001, were initiated in the District Court against System Partners Limited for its failure to file annual returns within the times specified for the calendar years 2000 and 2001. Section 125 of the Companies Act, 1963, as amended, provides: '(1) Every company shall, once at least in every year, subject to section 127, make a return to the registrar of companies, being its annual return, in the prescribed form. (2) If a company fails to comply with this section, the company and -(a) every officer of the company who is in default… shall be guilty of an offence. (3) Proceedings in relation to an offence under this section may be brought and prosecuted by the Registrar of Companies.' At that hearing, it was drawn to the attention of the trial judge, Mr Justice David Anderson, that the company had already filed the returns in question, albeit late, and had paid the associated late filing fees which were far in excess of what would have been payable if the returns had been lodged on time.

Applying the principle of double jeopardy, Judge David Anderson struck out the summonses because System Partners Limited had already been obliged to pay higher fees upon filing the returns late. The Registrar of Companies sought *certiorari* of the decision and submitted that a late filing fee was neither in form nor in substance a criminal penalty but rather a civil or administrative sanction, the object of which was to encourage the timely filing of annual returns. The late filing fees, it was argued, had no relationship with the prosecution and in so far as they were relevant it was only to issues of mitigation in respect of any fine to be imposed for the actual offence. The principle of double jeopardy was, therefore, not applicable. The High Court refused the order on the basis that the offence gave rise to a criminal sanction when there was already an administrative sanction in place (late filing return fees), and the applicant appealed to the Supreme Court. The appeal was allowed in the Supreme Court, where Geoghegan J noted that the issue of double jeopardy did not arise, as the imposition of the initial penalty was an administrative rather than criminal matter. The payment of the substantially increased fees would, however, be a legitimate matter to take into consideration by way of mitigation of penalty if there was a conviction in the case.

The issue of double jeopardy has also been considered by the Financial Regulator's office. It is permitted to impose civil administrative sanctions for 'prescribed contraventions' of relevant legislation. These sanctions include, *inter alia*, a caution or reprimand, a monetary penalty (not exceeding €5,000,000 in the case of a corporate and unincorporated body, and not exceeding €500,000 in the case of a person), and a direction disqualifying a person from being concerned in the the management of a regulated financial service provider (s 33AQ and 33AR of the Central Bank Act 1942). In 2008, for example, Quinn Insurance Limited was required to pay

€3,250,000 and Mr Sean Quinn (senior) was also required to pay a penalty of €200,000). The Financial Regulator also has criminal powers of prosecution and enforcement. However, and in response to the problem posed by the principle of double jeopardy, no criminal prosecution will be brought if the Regulator has pursued the administrative sanctions procedure which has resulted in the imposition of a monetary penalty (N Connery and D Hodnett, Regulatory Crime in Ireland, 2009, 140-151).

The potential for blurring of the boundaries was also addressed by the Irish Supreme Court, *In the Matter of Tralee Beef and Lamb Ltd (In Liquidation) Kavanagh v. Delaney & ors* [2008] I.E.S.C. 1, in which it described a restriction order, which prohibits a person from being involved in the management of a company for five years, as highly stigmatising and "gravely damaging to the reputation of a person thus afflicted." This would accordingly need to be taken into account in any subsequent criminal sentencing decision relating to the same misconduct. Similarly in *People DPP v Clarkin* (10 February 2010, Unreported, Court of Criminal Appeal, a trial judge, in a criminal fraudulent trading case, took into account the fact that the guilty party had also a five year disqualification order imposed on him. Finally, in *Re Kentford Securities Ltd; DCE v McCann* [2010] IESC 59, a discretionary disqualification order was held to be 'partly penal in nature'.